

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**SALLY SAPATA**

Claimant

VS.

**SOUTHWESTERN BELL TELEPHONE COMPANY**

Respondent

Self-Insured

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Docket No. 133,971

**ORDER**

Claimant requested review of the Award on Review and Modification dated July 1, 1996, entered by Assistant Director Brad E. Avery. The Appeals Board heard oral argument on December 17, 1996.

**APPEARANCES**

Beth Regier Foerster of Topeka, Kansas, appeared for the claimant. Michael C. Cavell of Topeka, Kansas, appeared for the respondent.

**RECORD AND STIPULATIONS**

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

**ISSUES**

The Assistant Director denied claimant's request for review and modification based upon the finding that there has been no change in claimant's physical condition since the initial award was entered on April 30, 1990. Claimant asked the Appeals Board to review that finding. The issues now before the Appeals Board on this review are:

- (1) Whether the proceeding should be remanded to the Assistant Director to permit the parties to respond to the independent medical evaluation and report prepared by Peter V. Bieri, M.D.
- (2) What is the appropriate record to be considered for this review and modification proceeding?

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the entire record, the Appeals Board finds as follows:

The Award entered by the Assistant Director should be set aside and this proceeding remanded for additional consideration as provided below.

(1) Claimant requested permission to reopen the record to respond to the report dated June 19, 1996, of Peter V. Bieri, M.D., whom the Assistant Director selected to evaluate claimant for purposes of this review and modification proceeding. Some nine months after the record was closed and the parties had submitted their case for decision, the Assistant Director requested Dr. Bieri to perform an independent medical evaluation. Before either party had the opportunity to respond to Dr. Bieri's findings, the Assistant Director issued the July 1, 1996, Award. The Assistant Director utilized Dr. Bieri's report to decide the request for review and modification of the original Award.

Claimant contends she was denied a reasonable opportunity to respond to Dr. Bieri's report and, therefore, requests that this proceeding be remanded to the Assistant Director to reopen the record. Respondent contends Dr. Bieri's report should not have been considered in any event because the Assistant Director lacked the authority to order the evaluation after the parties had submitted their case.

The Appeals Board finds that, in effect, the Assistant Director reopened the record upon his own initiative to receive additional evidence without extending the parties' terminal dates or otherwise giving the parties an opportunity to respond to the new evidence. The review and modification statute, K.S.A. 44-528, specifically empowers the Assistant Director to appoint a physician to evaluate a worker and report the findings. The principal question presented by this proceeding is whether the Assistant Director could reopen the record and order that evaluation after the parties had submitted their case for decision.

The Kansas Supreme Court has determined that the general public is an interested party in a workers compensation proceeding and public policy requires careful scrutiny of workers compensation settlements. See Cramer v. Railways Co., 112 Kan. 298, 211 Pac. 118 (1922); McGuire v. United States F. & G. Co., 134 Kan. 779, 780, 8 P.2d 389 (1932); Miles v. Wyatt, 138 Kan. 863, 865, 28 P.2d 748 (1934). The same public policy rationale is applicable to litigated proceedings under the Workers Compensation Act. Therefore, the Appeals Board finds that the Assistant Director upon his own initiative can determine that

good cause exists and reopen the record to accept additional evidence. The named parties may seek reopening of the record for good cause shown as provided by K.S.A. 44-523(b)(4). Public policy considerations likewise dictate that the Assistant Director should have that same ability.

As indicated in a long line of Kansas cases, any procedure which is appropriate and not prohibited by the Workers Compensation Act may be employed. See Bushey v. Plastic Fabricating Co., 213 Kan. 121, 515 P.2d 735 (1973), where the Court approved the procedure utilized by the examiner although neither the Workers Compensation Act nor regulations specifically provided for same.

Once the record is reopened, K.S.A. 44-523 dictates that the parties shall be given reasonable opportunity to respond to the new evidence. Therefore, the Appeals Board finds that the Assistant Director should have reset the terminal dates to give the parties a reasonable opportunity to submit any additional evidence necessitated by the receipt of Dr. Bieri's report. Based upon that finding, the Appeals Board finds that this proceeding should be remanded to permit the parties to complete the evidentiary record within the parameters to be set by the Assistant Director.

(2) At oral argument before the Appeals Board, the issue arose of whether the Assistant Director had the appropriate record to decide the issues presented in this proceeding. In the Award on Review and Modification, the Assistant Director listed only that evidentiary record that was compiled on or after the review and modification hearing held on May 27, 1993. With the exception of Dr. Bieri's medical report, that record listed by the Assistant Director generally conforms to the record listed by the claimant in her letter dated February 17, 1995, to Administrative Law Judge James R. Ward who was originally assigned to the proceeding and the record listed by respondent in the document entitled Respondent's Submission Brief filed with the Division of Workers Compensation on June 9, 1995.

The Appeals Board finds that in the absence of a specific stipulation, the evidentiary record to be considered in a review and modification proceeding includes the original evidence compiled to decide the original award. Generally, the original record must be reviewed so that the trier of fact can be familiar with the facts and circumstances at the time the original award was entered. Of course, some of the original testimony and evidence is irrelevant for review and modification purposes, and the parties should eliminate by stipulation that irrelevant material. However, in the absence of such stipulation, the trier of fact is responsible for reviewing both the original record and that which is presented anew.

In this instance, the parties did not stipulate to the evidentiary record to be considered for review and modification purposes. Despite claimant's designation of the record in her February 1995 letter, her subsequent letter to Judge Ward dated May 30, 1995, cites portions of the original evidentiary record. From that action it is

apparent that claimant believed the original record was also to be considered for purposes of this proceeding and that claimant had not stipulated to exclude that evidence.

Upon remand, the Assistant Director is directed to review both the evidentiary record presently designated in the Award on Review and Modification along with the original record unless the parties should otherwise stipulate.

**AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award on Review and Modification dated July 1, 1996, entered by Assistant Director Brad E. Avery should be, and is hereby, set aside and that this proceeding is hereby remanded to the Assistant Director for further consideration as provided above.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of January 1997.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Beth Regier Foerster, Topeka, KS  
Michael C. Cavell, Topeka, KS  
Office of Administrative Law Judge, Topeka, KS  
Brad E. Avery, Assistant Director  
Philip S. Harness, Director